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3 BEFORE THE SHORELINES HEARINGS BOARD  
4 STATE OF WASHINGTON

5 GEOFFREY J. BIDWELL, ) SHB No 93-78  
6 Appellant, )  
7 v )  
8 CITY OF BELLEVUE, THE OVERLAKE ) FINAL FINDINGS OF FACT,  
9 FUND. AND DEPARTMENT OF ) CONCLUSIONS OF LAW,  
10 ECOLOGY. ) AND ORDER  
11 Respondent )  
12 \_\_\_\_\_ )

13 On October 21, 1993, the City of Bellevue issued a shoreline substantial development  
14 permit and shoreline variance permit to Overlake Fund ("Overlake") to construct a 270 room,  
15 183,295 square foot hotel with an associated 143,881 square foot parking structure on the  
16 shoreline of Lake Washington. On November 29, 1993, the Department of Ecology ("Ecology")  
17 approved the variance permit with conditions. On November 22, 1993, Geoffrey Bidwell  
18 ("Bidwell") filed a request for review with the Shorelines Hearings Board ("Board").

19 A hearing was held on October 3, 1994, in Bellevue, at which time the Board visited the  
20 site, and October 5 and 6 in Lacey. Witnesses were sworn and testified, exhibits were introduced  
21 and examined, and the arguments of the parties were heard. Based on the above, the Board  
22 makes the following  
23

## FINDINGS OF FACT

### I

The shoreline substantial development permit ("SDP") approved by Bellevue would authorize Overlake to construct a hotel on a parcel of land, approximately 90% wetlands, at the northeast corner of a 6.9 acre parcel bounded on the north by S E 6th Street and on the east by 114th Avenue S E. The variance approved by Bellevue would authorize Overlake to exceed the general height limit of 35 feet on shorelines of the state, and build to a total height of 92.27 feet.

### II

Overlake purchased the property in 1980, as part of their acquisition of a larger, 14 acre site adjacent to and including the wetlands. They received a permit in 1985 for, and did construct, an office complex on the western half of the property. In conjunction with the permit for the office complex, Overlake recorded covenants to permanently preserve over half the site as wetlands and open space. Later, Overlake sold the western, office property, and changed the lot lines (Boundary Line Adjustment BLA-85-28) so as to add a major portion of the preserved wetlands to the easterly parcel on which the current proposal is sited.

### III

The general area to the north and west of the site is being rapidly and intensively developed by Bellevue as an extension of its downtown office and commercial core. The City's planning for development in the adjacent area is heavily influenced by the creation of the Bellevue Convention Center and the desire for hotel and other development which would support and be supported by the Convention Center.

#### IV

1 The wetland on which the project sits is a roughly rectangular piece bounded by S E 6th.  
2 S E 8th, 112th S E , and 114th S E . It is bisected by Sturtevant Creek, which flows from the  
3 north, through the wetland, and connects to Mercer Slough and Lake Washington proper . The  
4 wetland is an upstream part of the Mercer Slough system, and partakes of many of the wetland  
5 values and functions performed by Mercer Slough as a whole . While road and building  
6 development has incrementally acted to isolate the project area wetland from the larger Mercer  
7 Slough wetland, it originally was and is now a part of that larger wetland, and it is not an isolated  
8 wetland  
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10 A wetland delineation was conducted in October, 1990, by Shapiro and Associates.  
11 environmental consultants in Seattle, which determined the site to include approximately 0.8 acre  
12 of dry land, the balance being wetland  
13

14 Wetland functions performed by this smaller portion of the Mercer Slough wetland  
15 include flood storage, storm water filtration, and animal habitat, encompassing mammals, birds,  
16 reptiles and amphibians . By the evidence of dead animals found on adjacent streets, both beaver  
17 and muskrat are present, and blue herons nest in the portion of the Mercer Slough system  
18 immediately south of this wetland rectangle . Evidence of fish life in Sturdevant Creek exists,  
19 although its importance in that regard is not clear  
20

21 The Mercer Slough wetland system is a natural feature of the first importance . It has  
22 been the focus of a great deal of citizen activity and concern . As a result of citizen interest, the  
23 City of Bellevue designated a 320 acre area downstream from this project a nature park, with  
24 funding coming from state and local government sources as well as directly from Bellevue  
25

1 citizens voting to tax themselves for property acquisition. The importance of Mercer Slough is  
2 increased by the destruction of the great majority of the wetlands bordering Lake Washington,  
3 both in Bellevue and on other shorelines of the Lake

4  
5 V

6 In 1987, Overlake, to vest a building permit before the effective date of the City's Natural  
7 Determinants Ordinance, submitted a building permit application for a seven story, 238 room  
8 hotel with a height of 97 feet, and parking for 346 vehicles. A Draft Environmental Impact  
9 Statement was prepared and issued on June 23, 1989. The Final EIS was issued October 4, 1989.  
10 After more City process regarding zoning and land use issues, public hearings were held on  
11 September 5, October 24, December 10 and December 12, 1991. The City Hearings Examiner  
12 recommended denial of the application, mostly due to impacts on the wetlands. On appeal, the  
13 City Council, on June 22, 1992, rejected the Hearing Examiner's recommendation. On July 13,  
14 1992, the City Council approved a (land use) conditional use permit. On June 7, 1993 the  
15 Director of Design and Development (predecessor to the present Community Development)  
16 approved land use variances from the 50 foot zoning code setback requirement. On June 17,  
17 1993, he approved a shoreline variance from the 35 foot height limit, and on October 21, 1993,  
18 the shoreline substantial development permit was approved.

19  
20 The proposal as approved by the City in the shoreline substantial development permit  
21 would allow the hotel to cover 52,274 sq. ft. of the site, including 35,624 sq. ft. of wetland.

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23 VI

24 The original permit application, for the so-called "vested" alternative, has been  
25 supplanted by a succession of different proposals, to meet both the City's desires and those of  
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1 Overlake, before the present proposal ("Alternative G") was deemed acceptable to both the  
2 developer and the City

## 3 VII

4 Bellevue's land use code incorporates a wide range of values, from environmental  
5 protection to protection from adverse effects of density, noise, and parking. One of the values it  
6 seeks to further is the aesthetic one of how a development looks and feels from the street. To this  
7 end the City requires setbacks from the street for new construction. The required setback for the  
8 Overlake project would by code have been 50 feet, unless a smaller setback were approved. The  
9 City did grant smaller setbacks. In order to reduce the intrusion of the hotel into the wetlands,  
10 City staff had recommended little or no setback from the street line on the S E 6th side. The  
11 City Council, apparently weighing street esthetics more heavily, required a 20 foot setback from  
12 the street, at the cost of greater intrusion into the wetland  
13

## 14 VIII

15 Another tradeoff the City employed, in differing combinations over its consideration of  
16 the various Overlake proposals, was the tradeoff between building footprint and building height.  
17 The total space in a building is the product of the height multiplied by the footprint. Thus if the  
18 footprint is deemed too large, for example, it can be reduced by increasing the building height.  
19 without any change in the total size of the building  
20

## 21 IX

22 The project as approved by the City will cover most of the dry land portion of the site.  
23 except for the street setbacks required by the City, and 82 acre of the wetland. At 92 feet in  
24 height, it is much taller than the other buildings on the wetland, on the west side. The portion  
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1 extending into the wetland would be built over pilings, to preserve at least the flood storage  
2 function of the wetland, the displacement of the pilings themselves requires excavation of  
3 approximately 60 cubic yards of land under the hotel in order to avoid reducing flood storage  
4 Both the hotel and the parking garage would be built in part over the wetland

5 As a result of the City's and Ecology's required mitigation of wetland impacts, some  
6 trees would be planted near the hotel, and other enhancements, mostly in the form of vegetation,  
7 would be made, not to the wetland adjacent to the hotel, but to the main portion of the Mercer  
8 Slough wetland many blocks to the south

9 X

10 Overlake and its agents testified that a hotel is the only economically feasible use of the  
11 site, but no comparison with other possible uses is in evidence, and the uses of comparable sites  
12 on the wetland's west side do not include hotels. Similarly, Overlake argued that the variance  
13 represented the minimum necessary to afford relief from their hardship, but presented no  
14 calculation of that minimum, nor of the presumed hardship itself. Appellant, however, also  
15 presented no analysis of the extent of "hardship" for Overlake or of the minimum variance  
16 necessary to afford relief  
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19 XI

20 Despite the huge size of the proposed building in relation to the small amount of dry land  
21 available on the site, neither Overlake nor the City designed the project to minimize the intrusion  
22 into the wetland. Overlake's design has the hotel built around a central courtyard, thus using up  
23 precious dry land. Bellevue required setbacks from the street on two sides for aesthetic reasons,  
24 thus forcing the entire structure farther into the wetland  
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XII

Despite the over 92 feet height of the proposed hotel, the position of the site in relation to adjacent land uses is such that it does not block the view of the wetland from any residences. The principal view blockage would be from the I-405 freeway to the east of the site.

XIII

Despite some history of agricultural activities in portions of the wetland system, the portion of the wetland on which the proposed hotel would sit is in an essentially natural state, and is a natural shoreline.

XIV

Any conclusion of law deemed to be a finding of fact is adopted as such.

Based on the above findings of fact, the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject matter of this case under RCW 90.58.

II

In reviewing a local government's decision to grant, deny, or rescind a shoreline permit, the Board reviews the permit *de novo*. Buechel v. Department of Ecology, 125 Wn. 2d 196, 202-203, Department of Ecology and Attorney General v. Mason County and Hama Hama Company, SHB No. 115 (1976), Order on Motion. The various complaints raised by Appellants

1 regarding the City of Bellevue's decision making process, availability of documents, etc , are  
2 rendered immaterial and harmless by the Board's *de novo* review Attorney General v. Grays  
3 Harbor County, Slenes and Department of Ecology, SHB No 231 (1977) Earlier land use  
4 actions taken by the City, which were never appealed to the Board, have no effect on the Board's  
5 application of existing law to this property Buechel, at 211

### 6 III

7 As an associated wetland of Lake Washington, the wetland on which this proposed hotel  
8 would sit is a shoreline of statewide significance under RCW 90 58 030(2)(e) The wetland on  
9 the site is defined as within the Bellevue Shoreline Management Areas by the Bellevue Shoreline  
10 Master Program (BSMP) BSMP p 15 and 20 25E 010

### 11 IV

12 A hotel and parking structure is not a water-dependent use given priority for shoreline  
13 development under RCW 90 58 020 Gislason v. Town of Friday Harbor, SHB No 81-22 (1981),  
14 Clifford, et al., v. City of Renton and Boeing, SHB No 92-52 (1993)

### 15 V

16 The question of whether the proposed project constitutes a reasonable use was not  
17 brought before the Board by either party directly However, a proposal which would put such a  
18 massive structure on, and overlapping beyond, such a tiny sliver of dry land, inclines the Board,  
19 *sua sponte*, to wonder whether such a use is reasonable for this site (The Board may consider  
20 a proposed building in relation to the size, location and physical attributes of the parcel of land in  
21 assessing whether a use is reasonable Buechel, at 209 )  
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VI

RCW 90 58 020 , the Shorelines Management Act, states as a purpose

*protecting against adverse effects to the public health. the land and its  
vegetation and wildlife*

RCW 90 58 020 also requires that local governments, in their Master Programs, give  
preference on shorelines of statewide significance to uses which

*(2) Preserve the natural character of the shoreline, and*

*(4) Protect the resources and ecology of the shoreline.*

RCW 90 58 020 also requires

*In the implementation of this policy the public's opportunity to enjoy  
the physical and aesthetic qualities of natural shorelines of the state shall  
be preserved to the greatest extent feasible consistent with the overall best  
interest of the state and the people generally*

and

*Permitted uses in the shorelines of the state shall be designed and conducted  
in a manner to minimize, insofar as practical, any resultant damage to the  
ecology and environment of the shoreline area*

VII

The City of Bellevue Shoreline Master Program states

*Existing natural resources should be conserved* BSMP Policy 21 U 102

and

*Wildlife habitats should be protected, improved and, if feasible, increased*  
BSMP Policy 21 U 102b

and

*Existing and future activities on the City's shorelines and wetlands should be  
designed to minimize adverse effects of the natural environment* BSMP Policy  
21 U 104

and

*Provision should be made for public access to and along the water's edge in new substantial shoreline developments* BSMP Policy 21 U 156

and

*Parking facilities for motor vehicles or boat trailers should be minimized in the shoreline area* BSMP Policy 21 U 652a

### VIII

We find that the proposed development, by intruding into and damaging the wetland, fails to protect against adverse effects to the land, its vegetation and wildlife, it reduces the public's ability to enjoy the natural shoreline, and it fails to minimize damage to the ecology and environment of the shoreline area. and therefore, it is contrary to the policy of RCW 90 58 020

### IX

We find that the proposed development, by intruding into and damaging the wetland, fails to conserve existing natural resources, fails to protect, improve and increase wildlife habitat, fails to minimize adverse effects on the natural environment, fails to provide for, and actually reduces, public access to the shoreline, and fails to minimize the placement of parking facilities in the shoreline, and therefore, it violates the provisions cited above of the Bellevue Shoreline Master Program

### X

We find that the wetland mitigation plan proposed fails to fully mitigate the impacts on the wetland of the development, and most particularly fails to mitigate impacts on the Sturdevant Creek portion of the wetland system

## XI

1 A local shoreline master program, once approved and filed by Ecology, is state law as  
2 well as local law. Because a local government is a creature of the State, no local ordinance may  
3 override State law. The BSMP may be amended only by the City Council adopting a proposed  
4 amendment and submitting it to Ecology for approval.

## XII

8 The BSMP states

9 *When conflict arises between regulations of the Shoreline Overlay District and*  
10 *underlying land use districts, regulations of the Shoreline Overlay District shall*  
11 *prevail.* BSMP 20.25E.030

12 Increasing the project's intrusion into and damage to the wetland in order to reduce the  
13 variance the project required from the street setback provisions of other Bellevue land use  
14 ordinances was contrary to this provision of the City's SMP. If it intends that street aesthetics  
15 ordinances and policies should have priority over existing provisions of its Shoreline Master  
16 Program, the City must initiate an amendment to the BSMP.

## XIII

19 We do not find that no development of a non-water dependent use may ever occur in a  
20 wetland shoreline of statewide significance. We do conclude, however, that this development  
21 violates the Shorelines Management Act and the Bellevue Shoreline Master Program in its  
22 extensive and unwarranted coverage of this wetland, and that the wetland mitigation proposed  
23 fails to compensate for the adverse effects of the project.

XIV

1           Regarding the height variance approved by the City, a different analysis is necessary For  
2 a variance to be approved from the requirements of the SMA and the local SMP, the  
3 requirements of WAC 173-14-150(2) must be met (a) that strict application of the master  
4 program would preclude or significantly interfere with a reasonable use of the property not  
5 otherwise prohibited. (b) that the hardship is specifically related to the property and is the result  
6 of unique conditions, (c) that it is compatible with other permitted activities in the area and will  
7 not cause adverse effects to adjacent properties or the shoreline environment, (d) that it does not  
8 constitute a grant of special privilege and is the minimum necessary to afford relief, and (e) that  
9 the public interest will suffer no substantial detrimental effect  
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12           XV

13           In addition, RCW 90 58 320 requires that

14           *No permit shall be issued pursuant to this chapter for any new or expanded*  
15           *building or structure of more than thirty-five feet above average grade level on*  
16           *shorelines of the state that will obstruct the view of a substantial number of*  
17           *residences on areas adjoining such shorelines except where a master program*  
18           *does not prohibit the same and then only when overriding considerations of*  
19           *the public interest will be served*

20           We find that the hotel project with the approved height variance to 92 27 feet will not  
21 obstruct the view of a substantial number of residences

22           XVI

23           In any appeal of a permit or variance approved, denied or rescinded by a local  
24 government, the burden of proving that the permit or variance is inconsistent with the Shoreline  
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Management Act and the local shoreline master program is on the appellant. Wallingford  
1 Community Council, Inc., et al., v. City of Seattle, et al., SHB No 203 (1976), Buechel, at 205

2 XVII

3 We find that while the height variance for the project could sensibly be questioned on a  
4 number of the criteria of WAC 173-14-150(2), including the reasonableness of the proposed use.  
5 appellant has failed to carry his burden of proof that any of the criteria have not been met  
6 Absent such proof by appellant, the Board cannot overturn the height variance  
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8 XVIII

9 Any finding of fact deemed to be a conclusion of law is adopted as such

10 Based on these findings of fact and conclusions of law, the Board enters the following  
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## ORDER

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2           1 The height variance to a total height of 92.27 feet, as approved by the City of Bellevue,  
3 is affirmed

4           2 The substantial development permit is approved with the following conditions

5               a) No portion of the hotel, parking structure, or any other building on the site may  
6 extend into the wetland, as delineated by Shapiro and Associates in October, 1990. Because the  
7 dry land on the site is less than the footprint of the proposed structures, the footprint of the  
8 structures shall be reduced, in a configuration which avoids intrusion into the wetland, and

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10              b) The developer may create a balcony, promenade, deck or similar appurtenance  
11 to the hotel extending out over the wetland by up to a total of 5,000 square feet, provided that  
12 any such structure is readily available to the public at all reasonable daylight hours and during all  
13 times when it is available to paying guests of the hotel, restaurant or any other business, and that  
14 there shall be signage easily visible from the street inviting the public to use such structure to  
15 view the wetlands without charge, and that the public's access to the structure shall not be  
16 through the hotel lobby or in any other way appear to be at the discretion of the hotel, and

17  
18              c) Neither the hotel, the parking structure, any other structure, nor the viewing  
19 structure described above may be supported by any pier, piling, or other foundation element in  
20 the wetland, and the edge of the wetland may not be excavated or otherwise altered, and

21  
22              d) All exterior lighting on the wetland sides of the structures shall be aimed  
23 toward the structures or otherwise away from the wetland, so as to minimize the effects of  
24 artificial lights on wildlife in the wetland, and  
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e) Because these conditions will reduce the impacts of the project on the wetland,  
the wetland mitigation plan elements involving any work more than two hundred yards from the  
structures are eliminated. Those elements of the mitigation within two hundred yards remain as  
approved by the City.

DONE this 23<sup>rd</sup> day of January, 1995, in Lacey, Washington

SHORELINES HEARINGS BOARD

  
RICHARD C. KELLEY, Presiding

  
ROBERT V. JENSEN, Chairman

  
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BOBBI KREBS-McMULLEN, Member

  
JIM LYNCH, Member

  
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